Intellectual property enforcement

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Chapter 13
Part 1
EMPIRICAL CONSIDERATION OF ENFORCEMENT ACTION

Jane Cornwell *

1. **Introduction**

Enforcement plays an important role in the functioning of any IP system. In the UK, IP enforcement was identified as an area of concern by both the Gowers and Hargreaves reviews, the impact of digitisation and online infringement on the ability to enforce rights in copyright works being identified, in particular, as a major enforcement issue for the creative industries.[1]

This chapter examines the research which has been carried out into the civil enforcement of IP rights by creative industry rightholders – that is, civil infringement actions brought by rightholders or their licensees against alleged infringers, and related enforcement activity such as cease and desist correspondence or settlement negotiations. Investigation of these matters steps away from traditional doctrinal legal scholarship into the field of empirical legal research. As we will see, there has been relatively little empirical research into these matters to date, particularly insofar as relating specifically to the creative industries.

2. **Setting the scene: what do we need to know and how can it be investigated?**

In a literature review prepared for the UK Intellectual Property Office in 2009, Weatherall et al observed that, in the UK at least, at that time questions about enforcement had been largely addressed through anecdote and assertion; overall,

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* Lecturer in Intellectual Property Law, University of Edinburgh.

[1] UK Government, 'Gowers Review of Intellectual Property' (*UK Government,* December 2006) 41 <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf> accessed 15 May 2017; I Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (*UK Government*, May 2011) 67-68 <www.ipo.gov.uk/ipreview-finalreport.pdf > accessed 15 May 2017.

relatively little was known about the extent of infringement and use of enforcement procedures in the UK.[2]

Unsurprisingly, much of the focus of research to date has been directed to trying to establish actual levels of infringement across IP rights and sectors. There are considerable challenges in gathering reliable data on these matters, which will not be discussed here.[3] This chapter looks instead at the empirical research published to date on the IP enforcement process: from informal steps to enforce an IP right through the filing of court proceedings to their eventual disposal.

No single source of data or research method can cover all of these phases of the enforcement process. Court data is, of course, the best record of IP litigation, the parties and rights involved, case trajectories and outcomes. Comprehensive court data can, however, be difficult and time-consuming to collate. In the UK at least, researchers need to identify, access and review the relevant physical court files, tasks which may not be straightforward.[4]

Court files will also record only part of the overall picture, typically containing no details of negotiations or settlement deals between the parties, or any record of the factors privately influencing their decisions and conduct. As litigation only captures 'one extreme end' of the enforcement spectrum,[5] court files will also not tell us about informal interactions which precede or accompany court proceedings or which may even resolve a dispute without going to court.

If we want to know more – to flesh out the picture to include what happens outside court and, more generally, to understand not only *what* happens in IP enforcement but also *why* – we need to look to further and additional sources of data. Weatherall et al highlighted the potential usefulness of survey and interview evidence to explore unobservable matters such as the reasoning behind enforcement decisions and formal or informal steps to enforce short of issuing legal proceedings.[6]

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[2] K Weatherall and others, 'IP Enforcement in the UK and Beyond: A Literature Review', SABIP report no. EC001 (*UK Government*, 18 May 2009) 6 and 13 <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipresearch-ipenforcement-200905.pdf> accessed 15 May 2017.

[3] See further D Collopy, V Bastian and others, 'Measuring Infringement of Intellectual Property Rights' (*UK IPO*, 2014) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/325020/IP_Measuring_Infringement.pdf > accessed 15 May 2017.

[4] See, for example, the data collection process described in C Helmers, Y Lefouili and L McDonagh, 'Evaluation of the Reforms of the Intellectual Property Enterprise Court 2010-2013', (UK IPO, 2015) 12-15 and Appendix E <www.judiciary.gov.uk/publications/evaluation-of-the-reforms-of-the-intellectual-property-enterprise-court/> accessed 15 May 2017; See also J Cornwell, 'Intellectual Property at the Court of Session: A First Empirical Review' The Edinburgh Law Review 21.2 (2017): 192-216, describing IP data collection at the Court of Session in Scotland.

[5] Weatherall and others (n 2) 24.

[6] Weatherall and others (n 2) 7, 24, 26 and 59-64.

Rightholders themselves are the most direct source of evidence of claimant motivation and decision-making. However, there can be challenges in identifying, sampling and engaging with relevant populations of rightholders, particularly for research into copyright and other unregistered rights.[7] An alternative or additional source of data is to engage with other stakeholders, such as lawyers.[8]

3. Reviewing the empirical literature to date

Looking at the IP enforcement literature in the round, the most substantial body of empirical research relates to quantitative statistical analyses of US patent litigation.[9] Quantitative research has been conducted into patent litigation in Australia and some European jurisdictions, with a tentative picture now also emerging for the UK.[10]

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[7] Weatherall and others (n 2) 7 and 61.

[8] Lawyers are acknowledged in the literature as gatekeepers in litigation and dispute resolution: WLF Felstiner, RL Abel and A Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming and Claiming …' (1980-1981) 15 Law & Soc'y Rev 631, 645. Although information obtained from legal practitioners about their clients' motivations will to a certain extent be second-hand, lawyers will be able to speak to broad experience of a number of enforcement disputes across different clients, IP rights and sectors as well as providing valuable insight into how parties are advised: Weatherall and others (n 2) 7 and 63-64.

[9] For general reviews of such work, see: JO Lanjouw and J Lerner, 'The Enforcement of Intellectual Property Rights: A Survey of the Empirical Literature' (Jan-Jun 1998) No 49/50 Annales d'Économie et de Statistique, 223-246; K Weatherall and E Webster, 'Patent Enforcement: A Review of the Literature' (2014) 28(2) Journal of Economic Surveys 312–343. The volume of such research in the US reflects, to some degree, the relative ease of access to US court data, on which see DL Schwartz and T Sichelman, 'Data Sources on Patents, Copyrights, Trademarks, and Other Intellectual Property' in PS Menell, DL Schwartz and B Depoorter (eds), *Research Handbook on the Law & Economics of Intellectual Property* (Edward Elgar forthcoming) <https://ssrn.com/abstract=2646051> accessed 15 May 2017. Note, however, that Sag has reported some degree of inaccuracy in the PACER coding of US copyright litigation: M Sag, 'IP Litigation in US District Courts: 1994-2014' (2015-2016) 101 Iowa L Rev 1065, 1071.

[10] For the UK see, C Helmers, Y Lefouili and L McDonagh, 'Examining Patent Cases at the Patents Court and Intellectual Property Enterprise Court 2007-2013' (*UK IPO,* 2015) <www.gov.uk/government/publications/examining-patent-cases-at-the-patents-court-and-ipec-2007-2013 > accessed 15 May 2017 and Helmers and others, 'Evaluation' (n 4) (England and Wales); Cornwell (n 4) and J Cornwell, 'Between the formal and the informal: 'repeat players', 'one-shotters' and case trajectories in intellectual property infringement litigation at the Scottish Court of Session' Intellectual Property Quarterly (fortcoming, 2017) (Scotland). See also, F Rotstein and K Weatherall, 'Filing and Settlement of Patent Disputes in the Federal Court, 1995-2005' (2006) IPRIA Working Paper No 17.06 <http://ssrn.com/abstract=984148> accessed 15 May 2017 (Australia); K Cremers, 'Determinants of patent litigation in Germany' (2004) ZEW-Centre for European Economic Research Discussion Paper 4-72. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=604467> accessed 15 May 2017 (Germany); K Cremers and others, 'Patent litigation in Europe', 2013 ZEW Discussion Paper

Empirical research has also been carried out among lawyers, looking into aspects of patent practice.[11] Some surveys of inventors and patent firms have also been conducted.[12]

How far does this body of research assist in gaining an understanding of IP enforcement in the creative industries? Patent disputes are not typical in the creative sectors. There are also limits on how far data and conclusions drawn from research into one IP right can be validly generalized to other IP rights.[13] Patent litigation is particularly complex, involving uncertainty over claim construction and scope of protection, 'shifting goalposts' as the patentee often seeks to amend the patent in suit in response evidence of prior art and typically requiring expert witnesses, conduct of experiments and extensive prior art searching.[14] The empirical data gathered on patent disputes is, for these reasons, unlikely to carry across well to disputes involving the other types of IP right which would more commonly be the focus in the creative industries.

Outside the patent field, however, there has been much less by way of empirical legal research. In the US, aside from some general analyses of IP litigation, most importantly for present purposes two detailed recent quantitative analyses of US copyright litigation have been conducted by Cotropia and Gibson (examining full court files for a large sample of US federal copyright cases for the period from 2005 to 2008) and by Sag (analysing a database of all copyright cases filed in the US federal district courts from 2001-2014).[15] Gallagher has also undertaken insightful qualitative

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No 13-072 <http://hdl.handle.net/10419/83473> accessed 15 May 2017 (UK, Germany, France and the Netherlands).

[11] C Dent and K Weatherall, 'Lawyers' decisions in Australian patent dispute settlements: An empirical perspective' (2006) 17(4) Australian Intellectual Property Journal 255-276; WT Gallagher, 'IP Legal Ethics in the Everyday Practice of Law: An Empirical Perspective on Patent Litigators' (2011) 10 J Marshall Rev Intell Prop L 309.

[12] For example, W Kingston, 'Enforcing small firms' patent rights' (2000) <http://cordis.europa.eu/innovation-policy/studies/pdf/studies_enforcing_firms_patent_rights.pdf> accessed 15 May 2017.

[13] See, for example, the observations on differences between IP rights in: W Landes, 'An Empirical Analysis of Intellectual Property Litigation: Some Preliminary Results' (2004-2005) 41 Hous L Rev 749; and Cornwell (n 10). The possibility of nuances particular to copyright enforcement have also been noted in WT Gallagher, 'Trademark and Copyright Enforcement in the Shadow of IP Law' (2012) 28 Santa Clara Computer & High Tech L J 453, 466.

[14] On patent litigation complexity generally, see JH Ashtor, 'Opening Pandora's Box: Analyzing the Complexity of US Patent Litigation' (2016) 18 Yale J L & Tech 217.

[15] CA Cotropia and J Gibson, 'Copyright's Topography: An Empirical Study of Copyright Litigation' (2013-2014) 92 Tex L Rev 1981; M Sag, 'Copyright Trolling, An Empirical Study' (2014-2015) 100 Iowa L Rev 1105. For more general research into US IP litigation across other IP rights (including trade marks) see: Landes (n 13); M Sag, 'IP Litigation in US District Courts: 1994-2014' (2015–2016) 101 Iowa L Rev 1065 and 2015 update published at M Sag, 'IP Litigation in United States District Courts – 2015 Update' (January 2016) <http://ssrn.com/abstract=2711326> accessed 15 May 2017.

interview-based research among US lawyers to investigate their practices in copyright and trade mark enforcement across a range of sectors.[16]

In the UK, there have been attempts to draw empirical conclusions from analysis of copyright judgments reported on Westlaw.[17] However, since (as Weatherall et al have commented) cases which proceed all the way to judgment represent 'a small proportion of the whole universe of infringement and enforcement', such research has limited usefulness.[18] A fuller picture is beginning to form of litigation generally involving the full range of IP rights before the English courts.[19] Cornwell has also examined IP disputes at the Court of Session in Scotland, supplemented in the same project with a survey and interviews among Scottish legal practitioners and focusing in some respects specifically on the creative industries.[20] Some surveys of rightholders have additionally been conducted in the UK, including (although not limited to) businesses active in the creative industries.[21]

4. Key findings for the creative industries

As will be clear from the above, although perhaps unsurprising given the nascent stage of empirical legal research into IP litigation generally, there is very little empirical research which has focused specifically on IP enforcement within the creative industries. Research has tended to be conducted by IP right (for example, Sag's or Cotropia and Gibson's work on copyright litigation or Gallagher's research into

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[16] Gallagher (n 13).

[17] Y Mazeh and M Rogers, 'The economic significance and extent of copyright cases: an analysis of large firms' (IPQ 2006) 4, 404-420.

[18] Weatherall and others (n 2) 7. Mazeh and Rogers also did not report any particular findings regarding the creative industries.

[19] Helmers and others (n 4).

[20] Cornwell (n 4 and n 10).

[21] In particular: C Greenhalgh, J Phillips and others, 'Intellectual Property Enforcement in Smaller UK Firms', report for SABIP (UK IPO, October 2010) < http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipresearch-ipenforcement-201010.pdf > accessed 15 May 2017, addressing SME experiences of IP enforcement across IP rights; J Moultrie and F Livesey, 'Design Economics, Chapter three: design right case studies' (UK IPO, 2011) <www.ipo.gov.uk/ipresearch-designsreport3-201109.pdf > accessed 15 May 2017, examining the design law system; and G Ahmetoglu and T Chamorro-Premuzic, 'Design Rights and Innovation: A Pyschometric Analysis' in A Carter-Silk and others, 'The Development of Design Law - Past and Future: From History to Policy' (2012) <www.ipo.gov.uk/ipresearch-designlaw-201207.pdf> accessed 15 May 2017, also examining design law. Some other empirical work in the UK has also touched on IP enforcement – for example: M Grewar, B Townley and E Young, 'Tales from the Drawing Board: IP wisdom and woes from Scotland's creative industries' (2015) < http://www.create.ac.uk/wp-content/uploads/2015/10/Tales-from-the-Drawing-Board-2015.pdf > accessed 15 May 2017.

informal trade mark and copyright enforcement practices) rather than by sector, the findings from such work covering both the creative industries and other sectors.

That said, there are findings of importance for the creative industries to be highlighted from the research conducted to date, particularly as it relates to copyright enforcement. The data from the US, England and Wales and Scotland all show, for example, that a high volume of copyright litigation has originated with a concentrated group of high-volume creative industry enforcers. Cotropia and Gibson revealed that complaints by recording, film and TV industry rightholders in relation to unauthorised filing-sharing constituted over half of the US copyright cases coded by them for the time period 2005-2008; there was also a defined body of US copyright cases brought by performing rights organisations, typically against food and drink establishments.[22] The data collected by Helmers et al shows that copyright enforcement actions by copyright collecting societies constituted over 40 per cent of all English High Court IP actions and over 70 per cent of all High Court copyright actions brought in the period 2009-2013.[23] Cornwell's research at the Court of Session in Scotland also revealed a substantial volume of litigation in the time period reviewed from 2007-2014 brought by what the author calls 'bulk enforcers' (that is, rightholders who handle highly-standardised high-volume litigation) mostly from creative sectors.[24]

That said, there is also some evidence that a significant proportion of US copyright litigation originates with smaller rightholders. Noting that both popular and scholarly literature tended to portray major media companies as the dominating players in copyright enforcement, Cotropia and Gibson observed that this was not borne out by their data: although major media companies were active in specific targeted fields, putting aside the file-sharing litigations noted above in particular, smaller firms were the most common litigants across all other US copyright cases which they reviewed.[25]

Cotropia and Gibson's data also shows that the very significant majority of rightholders in the copyright actions reviewed by them were from the creative industries, including (to their surprise) some creative sectors previously regarded as 'low-IP' industries in US law terms.[26] In contrast, Cornwell's Scottish data showed that outside the field of bulk enforcement, in the years reviewed most Court of Session copyright litigation was commercial in nature, involving few rightholders from the creative industries and focusing instead on commercially-oriented copyright works.[27] Because of the variance in enforcement systems across jurisdictions, as well as in their economies and overall levels of litigious activity, findings in one jurisdiction cannot

[22] Cotropia and Gibson (n 15) 1989.
[23] Helmers and others (n 4) 16 and 17, Table 2.
[24] Cornwell (n 4 and n 10).
[25] Cotropia and Gibson (n 15) 2012-2016. This has been noted as a major finding: see M Sag, 'Empirical Studies of Copyright Litigation' in PS Menell and DL Schwartz (eds) *Research Handbook on the Economics of Intellectual Property Law* (Edward Elgar, forthcoming) < https://ssrn.com/abstract=2697447> accessed 15 May 2017.
[26] Cotropia and Gibson (n 15) 1992-1994. This has also been noted as a major finding: Sag (n 25).
[27] Cornwell (n 4).

necessarily be carried over into a different jurisdiction: the amount of creative industry-driven IP litigation in any given jurisdiction may be an example of one such matter upon which data may differ from one jurisdiction to the next.

There is also some evidence of trends in copyright enforcement in relation to online infringement. Cotropia and Gibson noted that the substantial body of US copyright file sharing cases brought by recording, film and TV companies in their dataset (see above) coincided with the coming to an end of this particular industry programme of enforcement against individual online file sharers.[28] Sag has, however, identified a new trend in Internet-related US copyright litigation, with a rise since 2010 in multi-defendant 'John Doe' actions (so-called 'MDJD actions') against unidentified and anonymous infringers driven by high case volumes filed by small number of rightholder claimants active in pornography.[29] Distinguishing this wave of cases from the earlier RIAA-led litigation campaign discussed by Cotropia and Gibson, Sag reports that, in 2013, such cases constituted the majority of copyright cases in 19 of 92 US federal court districts, amounting to 43% of all copyright cases commenced in that year.[30] In contrast, Cornwell reports almost no cases involving file sharing in the Scottish Court of Session dataset, a potential further example of different jurisdictional rules and procedures perhaps resulting in different levels of litigation for certain types of dispute.[31]

Beyond this, the empirical research into IP enforcement published to date tells us a little more about overall case histories from their very first to their very final steps. Presenting detailed data on litigation trajectories and outcomes, Cotropia and Gibson's work highlighted that most US copyright litigation reviewed by them was disposed of without ever reaching trial, with cases against file-sharers facing particularly low levels of opposition from alleged infringers.[32] Also looking at detailed case trajectories, Cornwell's research at the Court of Session established that only very few of the infringement cases reviewed went to trial, with infringement actions by 'bulk enforcers' (mostly concerned with copyright) facing lower rates of opposition.[33] Although not limited only to the creative industries, Gallagher's interview research into US copyright and trade mark enforcement also indicates that most trade mark and copyright disputes are resolved by a process of private negotiation either before or alongside court.[34] This

[28] Cotropia and Gibson (n 15) 1990; Sag, 'Copyright Trolling' (n 15) 1114.

[29] Sag, 'Copyright Trolling' (n 15); See the further discussion and debate over Sag's research in: B Greenberg, 'Copyright trolls and the Common Law' (2014-2015) 100 Iowa L Rev Bull 77; and S Balganesh and JB Gelbach, 'Debunking the Myth of the Copyright Troll Apocalypse' (2015-2016) 101 Iowa L Rev Bull 43.

[30] Sag, 'Copyright Trolling' (n 15) 1108-1109. Sag argues that these MDJD cases are not a general response to online infringement, but constitute a niche form of entrepreneurial activity which seeks to monetize copyright infringement: Sag, 'IP Litigation' (n 13) 1078.

[31] Cornwell (n 4).

[32] Cotropia and Gibson (n 15) 2002 and 2004-2005.

[33] Cornwell (n 10).

[34] Gallagher (n 15) 467, 482 and footnote 101.

is broadly consistent with an emphasis on out-of-court dispute resolution from the UK rightholder surveys mentioned above, although those surveys pose challenges from their low response rates or lack of representative sampling methodology.[35]

In terms of party decision-making and strategy, cost has been highlighted: not only for parties facing a single, large and expensive dispute, but also for some creative industry actors (particularly firms dealing in music, visual images and publishing) for whom it is the sheer volume of potential claims which imposes the cost burden.[36] At the same time and among a number of further factors, Gallagher's US research also particularly identified the legal merits of a claim as an important factor in lawyers' evaluations of their clients' position.[37] Just because the legal merits were important, however, did not mean that only strong claims would be asserted: Gallagher established that his lawyer interviewees were prepared to pursue even admittedly weak claims in some cases.[38] The importance of the legal merits linked into issues of legal complexity and uncertainty. Gallagher reported that many copyright and trade mark enforcement cases upon which his interviewees were called upon to advise were relatively straightforward to analyse in legal terms; however, rightholders sometimes preferred not to enforce their rights where potentially difficult defences, such as the US copyright doctrine of 'fair use', may be engaged.[39] In the UK, Ahmetoglu and Chamorro-Premuzic identified from their rightholder survey that the complexity and uncertainty of design law adversely impacted decisions of whether to enforce design protection.[40] The available court data certainly bears out that design rights are the least litigated of all IP rights before both English and Scottish courts.[41]

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[35] Greenhalgh and others' rightholder survey (n 21) achieved a response rates of 9.1% across all target groups, although supplemented on their specific IP enforcement question by telephone follow-up bringing the response rate up to 20.1%; some further and more detailed questions achieved very much fewer responses. Moultrie and Livesey (n 21) used a sample constructed from personal contacts, contacts identified via the social networking website LinkedIn and from two purchased databases; Ahmetoglu and Chamorro-Premuzic (n 21) used an open online survey circulated to various mailing lists and published via websites and blogs.

[36] Greenhalgh and others (n 21) 42.Concerns around cost were also noted by the two UK design sector surveys.

[37] Gallagher (n 16) 472 and 474, a finding mirrored by research into other forms of IP infringement – see for example on patent enforcement: Dent and Weatherall (n 11) 264, 271 and 272.

[38] Gallagher (n 16) 488, 490 and 496.

[39] Gallagher (n 16) 494.

[40] Ahmetoglu and Chamorro-Premuzic (n 21) 8-9, 71, 113, 117-118 and 156.

[41] The data for 2009-2013 collected by Helmers et al shows that rates of design litigation were low at the English High Court relative to other IP rights: Helmers and others 'Evaluation' (n 4) Table 2, 17. Rates of design litigation were also low at the English Intellectual Property Enterprise Court (Helmers and others, 'Evaluation' (n 4) Table 1, 17) and at the Court of Session (Cornwell (n 4)).

5. Concluding thoughts

This chapter cannot, of course, cover all of the data discussed and analysed in the literature referred to above. The research that has been done to date adds considerably to our understanding and the reader is referred to the far more detailed analyses in the work summarised above.

It is also clear, however, that there remains considerable scope for valuable further empirical legal research into IP enforcement in the creative industries. The court data published to date offers much to confound expectations – the relatively high proportion of small rightholders among US copyright claimants, the incidence of US copyright claims by 'low-IP' industries and (conversely) the relative lack of creative sector claimants in Scottish copyright litigation – suggesting that there is still much yet to learn from one jurisdiction to the next. There are also obvious research gaps, particularly in exploring further the enforcement experiences of smaller creative industry players. The research on enforcement against online infringement has tended, unsurprisingly, to focus on the high-volume enforcement initiatives of large scale enforcers; we know much less about how far (or how successfully) other creative industry rightholders are pursuing online infringement. We also know relatively little about creative industry IP litigation relying on rights other than copyright – for example, trade marks or designs. And, finally, we know little as to how disputes were actually concluded in terms of real world outcomes – whether the infringer actually stopped the contested conduct, whether damages were actually paid, whether legal costs were ever actually recovered and so on.

In the UK at least, while the surveys and interviews conducted among rightholders have flagged important issues particularly relating to the costs of IP enforcement, more representatively-sampled work directed specifically to creative industry respondents with higher response rates would assist in forming more concrete conclusions – preferably (in light of Cornwell's findings in particular) adopting some other sampling methodology than focussing on copyright or design ownership as a proxy for identifying creative industry rightholders. Following significant recent procedural reforms of the English courts to open up IP enforcement to smaller rightholders and with, it appears, greater use of the English lower-tier IP specialist court by smaller rightholders as a result,[42] there may yet be ways to make IP enforcement more amenable to many creative industry parties if more detailed and reliable data could be gathered on their needs and experiences.

[42] Helmers and others, 'Evaluation' (n 4).